IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 912 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

A S KANETKAR

Versus

LAXMANKUMAR PRIYADAS

Appearance:

MR J B Pardiwala for Mr FB BRAHMBHATT for Petitioner

MR PP BANAJI for Respondent No. 1

Mr K G Sheth, APP for Respondent No. 4

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 22/12/2000

C A V JUDGEMENT

This is a petition under Article 226 of the Constitution of India read with Section 482 of the

Criminal Procedure Code, 1973, for quashing and setting aside the process issued by the learned Judicial Magistrate First Class, at Umargaon in Criminal Case No. 1116/94.

The facts leading to this petition may be briefly stated as follows:

2. The first respondent herein, filed the aforesaid Criminal Case before the aforesaid Court against the present petitioner as well as against respondents no.2 and 3 for offences punishable under Sections 406, 420, 424 and 421 (1) read with Section 114 of the Indian Penal code. The first respondent herein, has alleged in the said complaint that the first respondent-Company, is a company registered under the Companies Act, 1956 having its registered office as well as factory at village Sarigam in Umargaon Taluka. The person signing the complaint is shown to be the Manager (Materials) employed in the said company and according to him, he is holding Mechanical Diploma and is also having the technical knowhow relating to the working of the company. He has further stated that the Managing Director has authorised him to file the present complaint.

3. It has been alleged in the complaint that the first respondent herein - the original complainant has been manufacturing certain chemicals like Phosphorous Trichloride, Dye Ethyl phosphoryl chloride, Tri Methyil Phosphate, Ammonium Chloride etc. That for the said purpose, the first respondent, herein, is having its project and machineries and for the said machineries, telephone, line pipes and fittings are the essential requirements.

4. With respect to the present petitioner and other respondents, it has been contended that M/s. Plastron Processors Ltd.,was shown as accused No.1, which is also a company registered under the Companies Act, 1956 having its registered office Mumbai. That the accused Nos. 2 and 3 have been running the day today affairs of the said company whereas accused no.4 has been engaged for supplying the goods as per the requirement of the customers. In fact, the present petition has been filed by Shri A S Kanetkar, who is shown to be accused no.4 in the complaint. It is further contended in the complaint that the factory of accused no.1 is situated at village Ratnagiri in Maharashtra State. That accused No.5 and 6 have been manufacturing different products and they have also undertaken the work of despatch and acceptance of

materials.

5. The complaint further shows that the original complainant has completed the work of the construction of the factory. That one of the four plants has already been completed and the remaining plants are yet to be installed. The complainant further alleges that the original complainant has started purchase of different materials and goods. That a peculiar type of pipes were required for the purpose of the said work and, therefore, it was necessary to see that the pipes are purchased and received as per the requirements of the complainant company. That for the said purpose, the pipes were such which can be bent at 90 degree and they should be as per the specimen and details shown in para 6 of the complaint. That accordingly the offers were invited for the said pipes and in accordance with the said invitation of offer dated 3.10.1993, the accused company submitted quotation of 10.10.1993. That the officers and Directors of the complainant company considered the said offer and quotation of the accused company and it was noticed that the pipelines offered by the accused company were as per the requirement of the complainant company. That even the officers of the accused company had given assurance and trust that the pipelines to be supplied by the accused to the complainant company would be as per the requirement of the complainant-company. That accordingly the order was issued by the complainant to the accused dated 11.3.1994. That the accused company responded to the said order by letter dated 28.3.1994 and, assured that the accused company will promptly deliver the goods in accordance with the requirement of the complainant.

6. The complainant company has further alleged in the complaint that after the issuance of the orders, the complainant company issued another order dated 17.5.1994 for other materials. That thereafter the accused company had sent some goods to the complainant at Sarigam factory with a view to create an atmosphere of trust and confidence. That when the aforesaid pipelines were actually put to use in the newly started plant at which it was noticed that the lining were not properly affixed in the pipelines and, therefore, it was noticed that the pipes have been bent and crushed. That therefore, it was found that the pipes supplied by the accused company to the complainant were defective.

7. The complainant has further alleged that in the above view of the matter, the complainant informed the accused company on 6.10.1994 disclosing the aforesaid fact. That the accused company replied on 10.10.1994

saying that the aforesaid pipes were not useful for vacuum services. That the officers of the complainant were shocked on receiving the said information from the accused. That the officers of the complainant had reminded the officers of the accused that the complainant required a particular type of pipes and this was agreed between the parties at the time when the contract was effected and yet the pipes were not in working condition, though there was guarantee of 12 months from the date of delivery. That the accused company requested the complainant to send the said pipes back to the Ratnagiri factory of the accused and accordingly on 14.10.1994, the complainant despatched 39 pipes to the accused at Ratnagiri factory. That even receipt thereof, was acknowledged by the accused company.

8. It is further alleged that instead of repairing the said pipes for being reused, the second accused, on behalf of the first accused, demanded additional amount on 17.10.1994 saying that the pipes which were sent back by the complainant to the accused were not the pipes supplied by the accused to the complainant and the pipes which were sent by the complainant as such were actually used before they were sent to Ratnagiri factory and accordingly the accused demanded additional amount of Rs.2,10,367.07 paise. That the accused company also assured that the pipes will be repaired accordingly and thereafter, they will be despatched and delivered to the complainant. That there was a telephonic talk between the officers of the company on 19.10.1994. That there was a meeting also. It was decided in the said meeting that an amount of Rs.4 lakhs be paid by the complainant to the accused. The complainant has alleged that since the complainant was in urgent need of the aforesaid pipe, the complainant company had issued a post dated cheque of 23.10.1994 and the accused had agreed to send the goods after accepting the said cheque. That thereafter, the accused company demanded another amount of Rs.6,53,213/under the pretext that the bank would not release the goods unless the full amount is deposited with the bank. That since the complainant company was in urgent need of the goods, the demand of the accused was considered and the cheque was given to the accused company. That thereafter, at the instance of accused No.2 to 4, accused no.5 and 6 had despatched the goods on 22.10.1994 at 3.30 p.m. from Ratnagiri factory. That the said goods reached Sarigam factory of the company on 23.10.1994. That the said pipes were checked by the officers of the complainant and it was noticed that some of the pipes had been again sent by the accused company to the complainant company, which had been sent to the

accused for repairing work. That the remaining pipes were not as per the requirement of the complainant and therefore, the said pipes were also rejected. That on 23.10.1994, it was Sunday and, therefore, with a view to avoid the encashment of the aforesaid cheque, the respondent company had directed the bank to stop payment of the cheque and had informed the accused company accordingly. That the said letter was sent by the messenger on 24.10.1994. That the messenger was detained for about two hours by the staff of the accused company and certain signatures were obtained by him on certain papers, for which the messenger had no idea or knowledge. It is further alleged that the aforesaid goods were not as per the requirement of the complainant and, therefore, they were rejected by the complainant. Other details have also been given but the main facts are that the goods were not sent as per the requirements of the complainant, and as per the contract, by the accused and by sending such goods, the accused company have committed several offences including offence of criminal breach of trust, criminal misappropriation, cheating etc. That all the accused persons have jointly committed the aforesaid offence and, therefore, it has been prayed that the aforesaid accused be punished for the aforesaid offences. On 28.11.1994, after recording verification, the learned Magistrate directed to register the complaint and process was ordered to be issued.

9. The case of the present petitioner is that the aforesaid complaint has been filed without disclosing any ingredients or allegation of offence. It is alleged that the complaint does not disclose any offence and that civil dispute has been involved in the matter and there is total non-application of mind on the part of the learned Magistrate before issuing the process. It is, therefore, prayed that the present petition be allowed and the aforesaid complaint be quashed.

10. Rule was issued at the first instance and the respondents have appeared in response to the service of rule. Documents have been filed and the arguments have been advanced at length on behalf of the parties. I have heard the learned Advocates for the parties and have perused the papers.

11. Following facts emerge from a bare reading of the complaint which is the subject matter of this petition.

i. The contesting respondents required the pipelines.

ii. The pipelines so required were such that they should have PTFE lining inside the pipelines.

iii. That the pipelines should be such that they should have been workable in vacuum duty as well as in normal working pressure.

iv. That they could be bent at 90 degree.

v. That in case of leakage, the plant would not function.

vi. That if the pipelines could not sustain pressure, then they would be broken resulting in explosion and heavy damage to the plant and to the persons working in the factory.

12. The complaint further shows that the above requirement was advertised and offers were called for. It further shows that the accused persons including the petitioner herein had been given to understand about the requirement of the original complainant and after fully understanding and knowing the requirements of the original complainant, the accused persons had agreed to supply these pipelines. It is further averred in the complaint that the pipelines received were not of the required quality and they could not sustain the pressure because of the fact that the pipelines were not of the required quality as per the requirement of the original complainant and as per the contract as well as, as per the understanding between the parties. It is further contended that thereafter some negotiations were entered into and some extra payment was also made by the original complainant to the accused persons for supply of the pipelines as per the requirement of the original complainant. It is also coming out from the complaint that despite the aforesaid position, the pipelines were not supplied in accordance with the contract. It is further alleged in the complaint that the pipelines supplied were not of the quality and as per the requirement and, therefore, the accused persons have committed cheating by knowingly and intentionally supplying such defective pipes after pocketing a handsome amount.

13. These facts alleged in the complaint require full consideration. The consideration can be had when the matter undergoes evidence trial and other procedure. This can be done only when the trial proceeds against the accused persons. It is the duty of the complainant to prove before the trial court that the agreement was as

above. The complainant is further required to prove before the trial court that there was not only breach of contract but there was dishonest intention of cheating at the beginning, on the part of the accused persons. The complainant is further required to prove that the accused persons have, under their joint action, actually cheated the present complainant and have committed the aforesaid offence.

14. This can be done only when the evidence is permitted to be recorded. The main contention raised on behalf of the accused persons are that the matter in question involved civil disputes between the parties and that no offence is made out. It is further contended that the learned Magistrate did not apply his mind on the facts stated in the complaint. So far as the application of mind is concerned, it can be gathered that after presentation of the complaint, the learned Magistrate has recorded detailed verification on oath of the complainant and the complainant has given details in his verification on oath. Learned Magistrate appears to have considered the contention and averments made in the complaint and the contents and averments in the oral verification on oath. It can be gathered that after appreciation of the aforesaid material along with the documents on record, the learned Magistrate has registered the complaint and has further directed to issue process of summons against the accused persons for offence punishable under Sections 406,420,414 and 421 read with section 114 of IPC on 20.11.1994.

15. It, therefore, cannot be said that the learned Magistrate acted without application of mind. It is to be seen that at the stage of submission of complaint, the learned Magistrate has to satisfy himself prima facie that the offence shown in the complaint are prima facie, made out. The complainant was not required to prove conclusively, the case stated in the complaint before the learned Magistrate at the time of presentment of the complaint. From a bare reading of the complaint along with the verification and documents submitted along with the complaint, it cannot be said that no offence was made out and, therefore, it could not be said that there was non-application of mind.

16. The second contention is that the complaint involves Civil Disputes. It would be seen that this is a commercial transaction and ordinarily, in commercial transaction, there may be civil disputes also involving criminal offences. The process can be refused or the complaint can be quashed if it is shown that the matter

involves Civil disputes and civil disputes only and there is no element of criminal offence to any extent. If that is not shown, then the complaint cannot be lightly quashed on the ground that there is civil dispute.

17. In my opinion, commercial transaction involves civil disputes and those disputes are bound to be there along with elements of criminal offences. In the present case, we find that the complaint discloses prima facie offence as stated in the complaint. Even at a bare look at the complaint, it can be said that offence of cheating has been prima facie made out against the accused persons. It is not necessary that the complaint should indicate all the ingredients of a particular offence. However, on a broad reading of the complaint, if it is found that the ingredients involving a criminal offence are there in the complaint, then, the complaint cannot be quashed merely because the wordings in the sections of the IPC have not been incorporated in so many words. It, therefore, cannot be said that since civil disputes have been involved, the complaint should be quashed. Now in my opinion, along with civil dispute, there is element of criminal offence in the present case, and, therefore, the complaint cannot be quashed on this aspect. It has also been contended that no offence has been made out at all. Now as said above, the complainant has come out with a case that the accused persons have acted with dishonest intention of cheating the complainant. It is also alleged in the complaint that the complainant was taken in confidence and under that confidence, the complainant parted with a huge amount in favour of the accused persons. It is further alleged that the accused persons knew the requirement of the complainant and despite that the accused persons did not supply the materials as per the contract and as per the requirement of the complainant. It is further alleged that at the time of supply of goods, it was represented that the goods were being supplied as per the requirements of the complainant. That even despite such confidence, undertaking and assurance, the accused persons have not supplied goods as per the requirements of the complainant and that has been done with a view to illegally and fraudulently picket the amount paid by the complainant to the accused persons. The action of the accused persons is shown to be dishonest. Therefore, it cannot be said that no offence is made out and it is a simple case of civil dispute.

18. Certain authorities have also been shown in support of the arguments. I am of the view that even if these authorities are taken into account, they do not

fully support the case of the accused persons, considering the peculiar facts and circumstances of the present case. In Mulchand R Baheti v. State of Gujarat (1997(1) GLR 679, it has been laid down that a Magistrate is not required to issue process in a mechanical manner. As said above, the learned Magistrate has considered the averments made in the complaint and has recorded verification on oath of the complainant in detail. The learned Magistrate appears to have considered the contents and averments made in the complaint, the allegations made in the oral verification on oath and the documents produced along with the complaint before issue of process. Therefore, the process cannot be said to have been issued mechanically without application of mind. It is also observed that the High Court, normally ought not to entertain such applications for quashing of process, unless the Magistrate is first approached by the applicant with a prayer to drop the proceedings, if no prima facie case is made out.

18.1. In Rajnikant A Patel v. State of Gujarat,(1997 (2) GLH 334, it has been laid down that when there is no allegation of entrustment, there is no question of punishment under section 406 of IPC. It is further contended that deception is the main ingredient and in absence thereof, no offence of cheating is said to have been committed. In the present case, it is alleged that the accused persons have acted with dishonest intention in the beginning. Therefore, there was some allegation of deception. Moreover, it is well settled that the pleadings of the mofussil courts are not to be strictly and rigidly construed. Therefore, on a bare reading of the complaint, if the offences are broadly made out, then strict,technical and rigid view cannot be taken for lightly quashing the complaint.

18.2. In Emperor v John Molver (AIR 1936 Madras 353), the facts were quite different. There the offence punishable was compounded with the permission of the Court and the conviction under section 406 of the IPC was set aside by the High Court. After all, it was a matter decided on the peculiar] facts and circumstances of that particular case. It is more so, when one offence was compounded and, therefore, it may be that for other offences, there may not be serious disputes between the parties. There may be indirect consent for disposing them without any conviction being recorded against the accused.

18.3. In Jamuna & Ors. v. S Panja (1986(3) Crimes 540, it has been laid down that a second revision is not

permissible and therefore, the matter cannot be dealt with under section 482 of the Criminal Procedure Code.

18.4. In Krishnan v. Krishnaveni (AIR 1997 SC 987), it has been laid down that a second revision is not permissible. However, at the same time, it has been observed that the High Court can entertain a matter, in case of grave injustice or miscarriage of justice, by exercise of inherent power. I am of the view that this is not a case in which this court should exercise inherent powers of quashing the complaint. I find that the present matter is not fit for exercising such powers.

18.5. In Hridaya Ranjan Pd. Verma & Ors. v. State of Bihar (JT 2000(3) SC 604, the FIR for offences under sections 406,420 and 120-B of IPC was lodged. There, a suit was also filed and there the complaint was quashed. However, the said matter was decided under the circumstances of that particular case. In the case of State of Gujarat v. Jaswantlal (AIR 1968 SC 700), it has been laid down that when the Government has been selling cement to the contractor solely for the purpose of its being used for the construction work, it is not an entrustment and it would not be a case of criminal breach of trust.

19. In the case before us, the case of criminal breach of trust and criminal misappropriation is coupled with allegation of cheating. Therefore, this case will not help the petitioner.

20. In the case of B Ramesh & Ors. v. State of Gujarat (1997(2) GLR 1655, it has been laid down that the learned Magistrate must apply his mind before issuing the process. As said above, in the present case, it cannot be said that the complaint was entertained without application of mind.

21. Any way, I am of the view that in the present case, it cannot be said that no offence has been made out and there is abuse of process by the complainant. It cannot also be said that there would be miscarriage of justice, if the complaint is not quashed. I am of the view that when the complainant has filed the complaint disclosing certain offences, then it would be just and proper, fair and legal to provide an opportunity to the complainant to prove his case. This is a case involving warrant-triable offence in a private complaint. Therefore, the court below would be required to record evidence and thereafter, the court will be required to hear the parties as to whether there is evidence on

record to warrant conviction if the evidence is unrebutted. Thereafter, charge can be framed. Therefore, even at this stage, the accused would be at liberty to plead that there is no evidence on record to warrant conviction if the evidence stands unrebutted. In that event, the Court can, discharge the accused persons. This can be done only by providing an opportunity to the complainant to lead evidence and prove his case.

22. On the other hand, there are decisions to show that the complaint cannot lightly be quashed. In Maninder Kaur v. Rajinder Singh & Ors. (1992 SCC (Cri.) 522), it has been observed that where on a complaint the Magistrate taking the view that there was sufficient ground for proceeding under sections 363,366, 376 of IPC and issued process, then the High Court, in a petition under Section 482 filed by the accused, was not justified in quashing the complaint. It is further observed that the accused have rights preserved under law at the stage of the enquiry as also at the trial, if there is one, eventually. Therefore, the High court's order was set aside and the Magistrate was directed to proceed further in the complaint in accordance with law.

23. In Bata v. Anama Behera & Ors. (1990Cr.L.J. 1110), the High Court of Orissa has observed that if some of the witnesses named in the complaint, are not examined and if cognizance of the offence is taken on the basis of the statements of the witnesses produced by the complainant and examined by the Court, the order of the Magistrate taking cognizance of the offence is not vitiated, meaning thereby, it is not necessary that at the stage of issue of process to examine all witnesses named in the complaint.

23.1. In Gopal Chauhan v. Smt. Satya (1979 Cr.L.J.446), the High Court of Himachal Pradesh, has observed that if the accused person is found sleeping over his grievances for more than three years, then it is not proper on the part of the High Court, while exercising powers under Section 482 of the Criminal Procedure Code or powers under Article 227 of the Constitution of India in quashing the proceedings.

23.2. In Mohinder Kumar v. State of Punjab (1982 Cr.L.J.524), it has been observed that the transaction of 'trade for sale' cannot be equated with entrustment.

24. Any way, the criminal proceedings will depend upon the facts of each case. It is very difficult to get two cases which may be totally identical and similar.

Therefore, the cases are required to be disposed of and decide on the facts and circumstances and the merit in each case in hand. In the present case, considering the complaint, the allegations made of the verification on oath and the documents on record, I am of the view that it cannot be said that no offence is made out. In that view of the mater, in my opinion, this is not a fit case for invoking inherent powers for quashing the complaint in question. At the same time, it would be open to the present accused persons to agitate all the points and to raise all the issues on legal and factual aspects before the court concerned at appropriate stage and if that is done, then the Court below will certainly appreciate the same, consider the same and decide the same in accordance with law.

25. With these observations, I find that this is not a fit case for invoking inherent jurisdiction and powers under Section 482 of the Criminal Procedure Code or under Article 226 and 227 of the Constitution of India.

The net result is that the present petition deserves to be dismissed and it is accordingly dismissed. Rule discharged. The interim relief stands vacated.

22.12.2000 [D P Buch, J.]
msp